[redacted]

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents,

VOICE-TEL ENTERPRISES, INC., *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NEW YORK STATE REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Nos. 94-1173, 94-1213

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF NEW YORK, *et al.*,

Petitioners,

MARYLAND PEOPLE'S COUNSEL, *et al.*,

Petitioners-Intervenors,

-against-

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents,

VOICE-TEL ENTERPRISES, INC., *et al.*,

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Preliminary Statement

The 1934 Communications Act safeguards the right of states to regulate intrastate telecommunications services. In fact, it expressly denies the Federal Communications Commission (FCC) jurisdiction over such matters. 47 U.S.C. § 152(b).[1]

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[1] *See* Hearings on S. 6 Before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess. 2133, 2152 (1930) (statements of Sen. Dill); *id.* at 2179 (statement of Sen. Smith); *id.* at 2141 (statement of Sen. Brookhart).

Nonetheless, in 1982, the FCC preempted an aspect of intrastate telecommunications regulation on the theory that preemption was needed (and therefore justified) to effectuate a goal that FCC officials had developed pursuant to the FCC's general purpose of maintaining an efficient interstate network (47 U.S.C. § 151).[2] This Court annulled the FCC's action, noting that permitting the use of agency goals, developed pursuant to general purpose language (47 U.S.C. § 151), to preempt activities expressly reserved to the states by Congress (47 U.S.C. § 152(b)) "would be to grant to the agency power to override Congress." *Louisiana v. Federal Communications Comm'n.* 476 U.S. 355, 374-375 (1986).

The Ninth Circuit decision of which New York seeks review endorses FCC preemption of a section 152(b) activity to effectuate a goal developed by FCC officials pursuant to the agency's general purpose language (section 151). The decision directly conflicts with this Court's holding in *Louisiana.*

I.

The Respondents are simply incorrect in their claim that *Louisiana* endorses the use of goals developed by FCC officials under section 151's general purpose language to preempt areas of regulation expressly reserved to the states

New York's petition for certiorari showed that this Court's decision in *Louisiana* rejected unequivocally the FCC's argument that it could use goals culled from section 151's general purpose language to preempt the states' regulation of section 152(b)

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[2] *In the Matter of Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies,* Memorandum, Opinion and Order, 48 Fed. Reg. 2324 (January 18, 1983) (December Order).

activities (476 U.S. at 370-374).[3] The Court also rejected the FCC's Title II (section 220) preemption argument because, among other things, the separation of joint costs allowed the FCC to fulfill its section 220 duty to set depreciation charges without preempting (476 U.S. at 375-378). Finally, footnote 4 of *Louisiana* distinguished the Court's rejection of the FCC's section 220 claim that "the FCC cannot help but preempt state depreciation regulation of joint plant if it is to fulfill its *statutory obligation and determine depreciation* ..." (emphasis added; 476 U.S. at 375) from the Fourth Circuit's allowance of Title II [sections 201-205] interconnection preemption in *North Carolina Utilities Comm'n v. Federal Communications Comm'n,* 537 F.2d 787, 792-793 (4th Cir. 1976), *cert. denied,* 429 U.S. 1027 (1976) and *North Carolina Utilities Comm'n v. Federal Communications Comm'n,* 552 F.2d 1036 (4th Cir. 1977), *cert. denied,* 434 U.S. 874 (1977) (*NCUC* cases) on the ground that, unlike the case of depreciation, "it was not possible [in *NCUC*] to separate the interstate and intrastate components of the asserted FCC regulation" [interconnection]. 476 U.S. 375 at n.4. Each of these points was supported in New York's petition by references to the decision's text, footnote 4, and the Communications Act.

The Respondents' briefs do not address most of the reasons why one cannot logically read *Louisiana* as endorsing section 151 preemption. For example, neither the FCC nor its intervenors have taken issue with "the most fundamental problem" (NY Pet. 17) in the Ninth Circuit's reading of *Louisiana.* Specifically, one cannot logically interpret *Louisiana* as creating an "impossibility" exception that permits section 151 preemption because *Louisiana*

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[3]As the Court stated, "[we cannot accept] an argument that the FCC may ... take action which it thinks will best effectuate a federal *policy.* An agency may not confer power upon itself" (emphasis added). 476 U.S. at 374.

did not discuss (much less apply) such a test in rejecting the FCC's section 151 preemption argument. 476 U.S. at 370-374.

The FCC and its supporting intervenors' briefs do, however, offer several arguments why *Louisiana* should be read as endorsing section 151 preemption. Their contentions do not withstand scrutiny.

First, the Respondents claim that the *Louisiana* opinion did not address the FCC's section 220 [Title II] preemption position until the text following footnote 4 (Resp. 11; Resp. Int. 9 n.8).[4] The paragraph from which footnote 4 is derived rejected a claim of GTE and AT&T that, given that depreciation is intended to assure timely capital recovery, a failure by the FCC to preempt intrastate depreciation charges would violate the FCC's section 220 obligation to set depreciation charges (*see* NY Pet. 19). The text that immediately followed footnote 4 rejected a *different* section 220 theory; to wit, that section 220 as a whole mandated "automatic" preemption insofar as it required telephone companies to book only depreciation charges set by the FCC.

Second, in support of their contention that footnote 4 endorses section 151 policy preemption, the Respondents refer not to the footnote, or the text it accompanied, but a single sentence six pages before the footnote. The text referenced by the Respondents reads:

> In our view, the jurisdictional limitations placed on the FCC by section 152(b), coupled with the fact that the Act provides for a "separations" proceeding to determine the portions of a single asset that are used for interstate and

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[4]Their allegation is contradicted by the Ninth Circuit's decision, which acknowledged that the text explained by footnote 4 "discussed a Title II function" (NY App. A30).

> intrastate service, 47 U.S.C. § 410(c), answer both preemption [section 151/220] theories. *Louisiana*, 476 U.S. at 369 (Resp. 10-11).

The quoted language addresses the two principles that the Court developed at length in *Louisiana*. First, the jurisdictional limitations of section 152(b) defeated section 151 preemption (476 U.S. at 370-374). Second, the separations process, among other things, defeated the FCC's section 220 argument (476 U.S. at 375-378).

New York's petition pointed out that reading footnote 4 in context with the role of the separations process in *Louisiana* essentially proves that the footnote could not have been intended to create an impossibility exception allowing section 151 preemption (NY Pet. 23). In response, the Respondents offer the conclusory statement that "footnote 4 of the Court's opinion, which discussed the impossibility exception, is part of the Court's discussion of the significance of jurisdictional separations proceedings, which responded to the Commission's preemption theories under both Title I (section 151) and Title II (section 220) ..." (Resp. 10). The separability of costs was relevant to both of the FCC's preemption arguments, but it had opposite effects. That is, the separations process defeated the FCC's section 220 preemption argument, but it lent credence to the FCC's claim that the FCC had to preempt to avoid the frustration of its section 151 goal of modernizing the network.[5]

Footnote 4 could not have concerned section 151 preemption because it addressed an argument that had been rejected due to the

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[5]Again, the Court rejected the FCC's section 151 policy preemption argument because it conflicted with the plain language of section 152(b). 476 U.S. at 370, 374.

separability of costs.[6] Only the FCC's section 220 argument was rejected because of the separability of costs. Therefore, footnote 4 could only have referred to section 151 preemption if the Court had not understood the separations process. The text of *Louisiana* makes it very clear that the Court fully understood separations. 476 U.S. at 373, 375-376.

The Respondents also contend that footnote 4 must have endorsed section 151 preemption because it referred to the *NCUC* cases, which involved Title I preemption (Resp. 11). The *NCUC* cases involved section 151 *and* Title II preemption and, as discussed above, it was in the latter context that they were referenced in footnote 4. Prior text in *Louisiana* specifically rejected the FCC's reliance on *NCUC* for section 151 preemption (476 U.S. at 374).

Finally, the Respondents claim that *Louisiana* makes no distinction between section 151 and title II preemption (Resp. Int. 7). *Louisiana* not only rejects section 151 preemption (476 U.S. at 370-374), but it holds that although section 151 and 152(b) should normally be reconcilable, in cases of conflict "we would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defined the jurisdictional reach of the agency formed to implement that purpose." 476 U.S. at 370. The Court's discussion of Title II preemption, which incidentally was *not* endorsed (476 U.S. at 376 N.5), focused on separations, the legislative history of section 220 and the FCC's ability to set depreciation charges without preempting. 476 U.S. 375-378. Thus, *Louisiana* certainly distinguishes between section

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[6]Specifically, footnote 4 distinguished the Court's *rejection* of an FCC preemption argument—because of the separability "of the asserted FCC regulation"—from two Fourth Circuit decisions where the asserted FCC regulation was *not* subject to separate interstate and intrastate components. 476 U.S. at 375 n.4.

151 preemption, which was rejected unequivocally, and Title II (section 220) preemption, which was rejected because of the separability of depreciation.

II.

Relevant Supreme Court precedent rejects the Respondents' contention that the FCC may use section 151's general purpose language to override section 152(b)'s specific denial of jurisdiction

In support of their claim that the FCC may use general policies to intrude on jurisdictional matters expressly reserved to the states by Congress, the Respondents cite *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691; *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354 (1988); and *City of New York v. Federal Communications Comm'n,* 486 U.S. 57, 66-70 (1988) (Resp. 10; Resp. Int. 7). None of these cases involved federal preemption of a section 152(b) activity.

To our knowledge, the only holding by this Court that addressed an FCC attempt to use a section 151 goal to preempt a section 152(b) activity is *Louisiana* and, in that case, the Court annulled the FCC's action. Further, as noted above, the Court concluded that "were we to find the sections to be in conflict, we would be disinclined to favor the provisions declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose." 476 U.S. at 370.[7]

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[7]The Respondents-Intervenors cite *Computer and Communications Indus. Ass's v. Federal Communications Comm'n (CCIA),* 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983), which, unlike the *NCUC* cases, involved only section 151 preemption (Resp. Int. 11). The FCC and its supporting intervenors heavily relied on *CCIA* in *Louisiana* for the

(Continued on next page.)

The Intervenors claim that the FCC's *Computer III* Remand Order was issued pursuant "to both its Title I and Title II authority" (Resp. Int. n.6). The FCC has previously indicated that its *Computer III* order was not issued pursuant to Title II (*see People of the State of California v. Federal Communications Comm'n.* 905 F.2d 1217, 1240 n.35) and that it was not attempting to exercise title II jurisdiction over enhanced services.

The Respondents assert that state regulation of the areas which the FCC has attempted to preempt would "defeat the Commission's regulation of the same services" (Resp. (I) [Questions Presented]). The states are not attempting to regulate any interstate telecommunications service. However, in contending that section 151 goals form a basis for preempting areas expressly reserved to the states by section 152(b), the FCC is implicitly asserting that if a telecommunications service involves any percentage of interstate usage, FCC policies take precedence over state regulation.

While intrastate rates were required to give way to interstate regulation in the *Shreveport R.R. Rate Cases (Houston, East and West Texas Ry, Co. v. United States,* 234 U.S. 342 (1914)), section 152(b) was added to the 1934 Communications Act to prevent Shreveport's application to telecommunications. Hearings on S. 2910 Before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess. 179 (1934). The Respondents essentially assert that section 152(b)'s safeguards apply only to rate regulation (Resp. 8-10; Resp. Int. 8), but this Court in *Louisiana* flatly rejected that position. In the Court's words: "we are not persuaded that it was anyone's understanding that this 'overruling' [of the *Shreveport* rate case] could or should be accomplished by merely

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(Continued from previous page.)
proposition that the FCC could use a section 151 goal to preempt section 152(b) activities, but, as discussed above, the Court rejected the FCC's position. 476 U.S. 370-374.

including in the Act one section which forbade the FCC to establish specific rates for certain intrastate services; had this been the intention, it would have hardly been necessary to deny the FCC the jurisdiction over 'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service ...'" (476 U.S. at 373). In permitting the FCC to preempt state regulation of intrastate services in order to further a section 151 in-house policy, the Ninth Circuit has erroneously applied what can only be described as an aberration of the *Shreveport* doctrine to telecommunications.

Finally, the Respondents allege that attempts by the FCC to dictate the manner in which intrastate enhanced telecommunication services will be provided does not invite a "one fits all" agenda and that a failure to preempt would lead to "balkanization of the nation's telephone system and an emasculation of the FCC's plenary, regulatory authority over interstate communications" (Resp. Int. 12). In 1934, Congress recognized that telecommunications, like our nation, would be best served by a system that was unified, but not necessarily uniform. Instead of mandating centralized planning by the FCC, Congress left intrastate communications to on-the-scene state regulators who were best able to take measure of the needs and abilities of local customers.

With states serving as regulatory laboratories, a relatively primitive telephone system has blossomed into the most reliable, technologically advanced and affordable telecommunications network in the world. Permitting the FCC to preempt that states' regulation of intrastate communications simply to carry out policies of FCC officials would undercut the marriage of innovation and local responsibility that has served the country well for 50 years.

The advent of local telecommunications competition only accentuates the need for dual regulation. Programs for creating a fair playing field while protecting customers from potential rate shock differ significantly depending on customer needs, the local

telecommunications infrastructure and potential competitive interest. If state regulators are to implement these strategies in a meaningful, effective manner, they cannot be preempted by "one fits all" FCC policies developed pursuant to section 151's general purpose language.

In any event, as this Court has often noted, preemption analyses ultimately are reduced to the question, what did Congress intend. *E.g., Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). The plain language of section 152(b), the legislative history of the Communications Act and this Court's decision in *Louisiana* leave no question that Congress intended to "safeguard the rights of the states ..." to regulate intrastate communication services. *See* Hearings on S. 6 Before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess. 2141 (statement of Sen. Brookhart). In approving section 151 preemption of intrastate services, the Ninth Circuit's decision dramatically undermines those rights.

Conclusion

For the reasons discussed above, New York's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Dated: March 16, 1995

Respectfully submitted,

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